STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LYALL TOWER,

Defendant-Appellant.

UNPUBLISHED
April 23, 1999

No. 203366
Mecosta Circuit Court
LC No. 95-3702 FH

Before: MacKenzie, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548, two counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548, felony-firearm, MCL 750.227b; MSA 28.424(2), unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645, forgery, MCL 750.248; MSA 28.445, and uttering and publishing, MCL 750.249; MSA 28.446. Defendant was sentenced to life without parole for the first-degree murder convictions, a consecutive two-year term for felony firearm, forty to sixty months for unlawfully driving away a vehicle, and 112 to 168 months for each of the uttering and publishing and forgery counts. Defendant appeals as of right his convictions, sentence, and the denial of his motion for a new trial. We affirm.

This case arose out of the murders of defendant's uncles, Ron and Paul Tower, aged fifty-seven and forty-one, respectively, in July 1995. The Tower brothers were single, lived together at a farmhouse in Remus, Michigan, and were mentally impaired to varying degrees. Ron Tower could not read, could write only his name, was not gainfully employed but performed chores around the farmhouse, was diabetic and depended on his brother for medication, and was extremely shy. Paul Tower could read and write, was employed as a custodian, maintained and administered his own bank accounts, and owned two vehicles, a truck and a 1992 red Ford Escort. The Tower brothers were last seen alive on the afternoon of July 5, 1995, with defendant, at their farmhouse. On July 6, 7, and 8, 1995, withdrawals were made from Paul Tower's savings account in Big Rapids. On July 9, 1995, Paul Tower's red Escort was abandoned at an accident scene in Grand Rapids. A witness later identified defendant as the driver of that vehicle and as having fled the scene. On July 13, 1995, human

blood and hair were found in various buildings at the Tower farmhouse. On that date, Mecosta County Sheriff's Detective Richard Rau interviewed defendant, and on the following day Rau arrested defendant for uttering and publishing and unlawfully driving away Paul Tower's Escort.

On July 26, 1995, partially decomposed bodies matching descriptions of Paul and Ron Tower were found in a remote area of Mecosta County. Both had been stabbed and shot with a .22 caliber weapon. Around August 15, 1995, defendant was additionally charged with two counts of murder, felony firearm, and forging signatures on savings withdrawal slips drawn on Paul Tower's savings account on July 6, 7, and 8, 1995. Defendant was convicted as charged and his motion for new trial was denied. This appeal ensued.

I

Defendant first argues that the trial court abused its discretion when it admitted evidence of prior acts in violation of MRE 404(b).

We review a trial court's determination to admit evidence for abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Evidence of a defendant's other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Such evidence may be admissible for other purposes under MRE 404(b)(1), including proof of motive, opportunity, and knowledge. *Id.*; MRE 404(b)(1). The prosecution must establish that the evidence is relevant to prove a fact within one of the exceptions to the exclusionary provision of MRE 404(b). If the evidence tends to prove some fact other than character, admissibility depends on whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence. *Crawford, supra* at 385.

Following a lengthy hearing at which a number of motions were considered, the trial court granted the prosecution's pretrial motion in limine to introduce evidence under MRE 404(b).

At the hearing, a Grand Rapids police officer testified that around February 1995 defendant contacted the Grand Rapids Police regarding Heather Gallapoo, a teenage runaway and prostitute, and offered to help find her and to give the police names of persons who supplied her with cocaine. Defendant told the officer that he had known Heather for a few weeks and that he did not want to see her prostituting herself. Defendant also gave the police Rebecca (Becky) Cochran's name and said she was a friend and a prostitute. At one point, Heather came home when defendant was waiting at her home, and defendant called the police so that she would not leave. The police officer testified that Heather and defendant were arguing, and that Heather said that she did not want defendant to be there. Defendant offered to and did work with undercover officers, attempting to make drug purchases twice. The officer last spoke to defendant in April 1995.

Heather's mother, Sharon Gallapoo, testified that defendant called her home in January 1995 looking for Heather and, when he was told she had run away, defendant offered to help find her. Defendant told Sharon Gallapoo he really liked Heather and that he worried about her. Defendant

spent several nights on Mrs. Gallapoo's couch waiting for Heather. Defendant told her that he bought cocaine for Heather to "take the edge off" so that she would not run away. Around the end of March 1995, defendant rented a motel room for himself and Heather and told Mrs. Gallapoo that he had used all of his paycheck and part of his savings to rent the room and buy drugs. Mrs. Gallapoo testified that she was shocked that he would do that. Defendant wanted Heather to move in with his sister, but Heather would not. Defendant stayed at Mrs. Gallapoo's house for two or three nights a week for about five weeks, until the beginning of April 1995. Mrs. Gallapoo did not see him after that until July 1995, the day before he was arrested, when defendant picked up April Calver, Heather's older sister, on the street and April offered to show him where Heather was. On cross-examination, Mrs. Gallapoo testified that between April and July 1995 she did not see defendant, but his number showed up various times on her telephone caller identification box. In May and June 1995, Heather was living with a boyfriend named Mark.

April Calver testified that she met defendant around January 1995, when she and Heather were prostitutes, and that defendant was upset about Heather prostituting herself. Heather told her that she and defendant had had sex when they first met, and that defendant had paid her fifty dollars. Defendant told her he liked Heather a lot, and April saw defendant kiss Heather, hug her, and try to hold her hand, but Heather would get a little mad. Defendant seemed to want Heather a lot, more than Heather wanted him. There were quite a few times that defendant gave Heather and April money for crack, once he spent about $150 to $200 in one night, another time he bought $400 worth of crack and rented a hotel room. April further testified that defendant would sometimes wait while Heather would turn tricks and then drive them to get drugs, and that for about one month he did it nearly every day. Heather began to think of defendant as a "pain" and tried to get rid of him and treated him badly. April testified that when defendant would spend money on her and Heather, they were more willing to be with him. She testified that she saw defendant in May 1995, at which time he asked about Heather, and she told him Heather had a boyfriend.

Heather testified that she was sixteen when she met defendant in January 1995. That night they had sex, he paid her fifty dollars, told her he liked her, and she gave him her phone number. After that night she had sex with him about five times, but not for money. She testified that they had "kind of" a boyfriend-girlfriend relationship and she stopped or decreased her prostituting for a time. She testified that her parents liked defendant and were encouraging the relationship, that defendant wanted her to stop prostituting and get off drugs, and that he told her a lot of times that he loved her. He also told her several times that he wanted to marry her and talked about having children. Heather testified that she eventually wanted to get away from defendant, so she would leave home for Becky Cochran's apartment. Heather then got reported as a runaway and the police picked her up at Becky's apartment. After that defendant would buy her crack to try to keep her at home. Defendant would take her to buy crack and paid for it a lot of times. Heather testified that defendant was an easy person to get things from and would do whatever she asked. On one occasion defendant owed money to a person she got drugs from and the three drove to a farmhouse, where defendant said he could borrow money. Heather testified that she wanted defendant to stop coming around because she did not love him as much as he loved her. Heather further testified that she saw defendant until approximately mid-April 1995, and did not see him after that until July 7, 1995, when defendant found her on the street and was driving a red

car. They went to buy drugs, and defendant gave her money. She also saw defendant on the following Sunday, he gave her $100, said he was staying at the Radisson, and gave her a key to the room at the Radisson. During that weekend, Heather saw Becky's mother, Melanie VanTuinen, who told her that Becky and defendant were going to banks and drawing money from defendant's uncle's account. Heather also saw defendant the following Thursday and he asked her to say she had been with him for all of the previous weekend if asked.

Becky Cochran testified that defendant was obsessed with Heather and would not leave her alone. She testified regarding defendant's relationship with Heather:

> . . . she would treat him so awful. I mean, she would call him names. He would give her money. She would take the money and leave and run off and he would be following her. He followed her like a little puppy. I mean, he wouldn't – when he first met her, he wouldn't stop calling my motel room, and he wanted to have sex with her but he want [sic] to be with her, but she wanted money to be with him and he didn't have any money. He just – when I was in jail, there was a girl in there and he was writing her letters and telling her how much he loved her and stuff and he didn't even know her. He told Heather he loved her all of the time and Heather told him, "I hate you. I don't want you near me. Leave me alone." He wouldn't leave her alone. He was more or less stalking her.

When asked why defendant did not see Heather for a while, she answered that the only reason she could figure was that Heather could not stand him, that all she wanted was his money and he wanted more. When she saw defendant in July 1995 he told her that he was going to go find Heather.

The trial court determined that defendant's conduct involving cocaine and prostitutes, particularly Heather, put in context the depth of defendant's feelings toward Heather, his understanding of the dynamics of crack addiction and how important it would be to his relationship with Heather, and how that might affect his behavior, and went to establishing motive. The trial court balanced the probative value of the evidence against potential prejudice and determined that reasonable inquiry into the area was appropriate. The trial court granted the defense's request that a limiting instruction be given.

A

Defendant first argues that the trial court abused its discretion by admitting evidence of uncharged criminal activity, evidence related to defendant's relationship and interactions with prostitutes, particularly Heather, that occurred four to six months before the murders. Defendant argues that the prosecution justified the introduction of the evidence on the grounds of motive, but that this rationale was not supported by the evidence, which, defendant argues, indicated that defendant's relationships with the prostitutes ended almost four months before the murders. Defendant argues that because there was no close temporal relationship between the charged crimes and the January to March 1995 time period, the evidence was not relevant, and further asserts that the evidence was cumulative and highly prejudicial. Defendant also argues that there was no justification for the volume of evidence introduced

and that the prosecution in closing argument linked these events, at least five times, with defendant being strange and abnormal, exacerbating the error.

The prosecution's theory of the case was that defendant murdered his uncles to gain access to their money. The challenged evidence of defendant's relationship and activities surrounding Heather and other prostitutes was offered to show defendant's motive, i.e., to obtain money defendant needed in order to secure Heather Gallapoo's company, which required that he pay for drugs for her.

Although there was evidence that defendant and Heather did not see each other from approximately April to July 7, 1995, we do not agree that this renders the evidence of defendant's interactions with her irrelevant. First, we note that there was evidence at trial that defendant called Heather's mother several times during this period. There was evidence that Heather would only see defendant as long as he provided money to buy drugs, and that defendant had spent all of his paycheck and part of his savings to buy Heather drugs and rent a hotel room in late March 1995. There was also evidence that between April and July, Heather was living with another man, but defendant's interest in her continued. The prosecution presented evidence that Paul Tower had decided to stop lending or giving defendant money in the spring or summer of 1995, reversing a long-standing pattern of largesse. The evidence indicated that once defendant obtained money from Paul Tower's savings account on July 6, 1995, after the Tower brothers disappeared, he immediately reestablished contact with Heather, provided her with money to buy crack, invited her to stay with him at the Radisson hotel, and gave her a key to the hotel room.

There was substantial trial testimony to support the prosecution's theory of the case. It was not, as defendant appears to argue, a fanciful theory that did not hold together at trial. There was evidence from which a jury could have inferred that defendant could obtain female companionship only by paying for it, that he was virtually obsessed with Heather Gallapoo after having met her in January 1995, that he pursued her but was rejected unless he could provide her with money to buy drugs, which he did, and that he was willing to go to great lengths to secure her companionship.

We conclude that the challenged evidence was offered for a proper purpose under MRE 404(b) and was relevant. We further conclude that its probative value was not substantially outweighed by unfair prejudice. The evidence was highly probative in that it tended to establish that defendant was driven to murder his uncles because he could secure Heather's companionship only if he had money, he had depleted his own financial resources, and his Uncle Paul no longer wished to give him funds. Further, the evidence was not offered to show that defendant was a bad person. Indeed, the evidence showed that defendant wanted to help an addicted prostitute stay off the streets and stop using drugs, as several prosecution witnesses testified. Additionally, the trial court gave a limiting instruction. We also disagree that the witnesses' testimony was cumulative or voluminous. Defendant had interacted substantially and individually with each witness and, although there was some overlap, each testified about different aspects.

Additionally, the prosecution's references in closing argument to defendant's being strange were in the context of defendant's having a side that his family members did not know, and were in response to the defense's theory that defendant was incapable of committing the execution-type murders of his

uncles, in support of which the defense presented testimony of various family members that they had never seen or known defendant to act violently and that defendant often helped others. The prosecution properly argued that there was evidence that defendant, a twenty-five-year-old, did not have girlfriends or male friends, did not bring women or male friends to gatherings, liked female companionship but had to pay for it, and that that evidence and his activities of finding Heather, driving her to buy drugs and sometimes waiting for her in his vehicle while she turned tricks, indicated that defendant was different than the person he purported to be. We find no error.

B

Defendant also challenges the admission of a 1988 car loan defendant obtained for which Paul Tower co-signed. Defendant argues it was not relevant because it was not contemporaneous with or factually similar to the crimes charged, had no bearing on 1995 events, and was highly prejudicial because it painted defendant as a bad man who took advantage of his uncle. Similarly, defendant argues that evidence of Paul Tower's check #302 and other financial dealings between defendant and Paul Tower were improperly admitted.

Regarding the 1988 car loan, an NBD bank representative testified that defendant took out a loan in May 1988 for a 1988 Ford Escort in the amount of $11,281.35. Defendant did not make timely payments. In July 1989, the bank wrote an extension, which brought the loan up to date in that the delinquent payments were added to the end of the loan. After July 1989, defendant failed to make the first payment and the loan again went into delinquent status. The car was repossessed on September 7, 1989 and sold for only $2,200, in part because it had 48,000 miles on it and was in very poor condition. The bank representative testified that the bank's records indicated that defendant told the bank at least three times that he would talk to the cosigner and get caught up that way. In August 1989, certified letters stating the vehicle had been repossessed and the vehicle would be sold were sent to both defendant and Paul Tower. Paul Tower paid off the loan in full, a total of $8,173.33, between October 1989 and January 1993. Defendant testified that he was unaware until about 1994 that Paul Tower had paid off the debt.

Regarding check #302, a bank representative testified that it was presented to the bank on February 20, 1995, causing a subsequent check to bounce. The bank representative testified that Paul Tower had never otherwise been overdrawn. Another bank representative testified that Paul Tower discussed check #302 with her, that she ordered a copy of the check, and that she concluded that the check was not signed by Paul Tower when she compared it to his signature card. She discussed pressing charges with Paul Tower, but he declined to do so at that time. Several witnesses testified that Paul Tower was saddened by this incident and, in the spring or summer of 1995, expressed to several people that he would no longer give defendant any money. The prosecution also presented evidence of a number of checks Paul Tower wrote defendant in 1994 and 1995 and of other money Paul Tower had given or loaned defendant.

We conclude that the trial court did not abuse its discretion in admitting this evidence. The evidence was offered to show that defendant used Paul Tower for money, had opportunity to obtain money from Paul Tower, and that he had knowledge of Paul Tower's finances - - proper purposes

under MRE 404(b). As noted above, the prosecution presented evidence that defendant's opportunity to continue obtaining money from Paul Tower was beginning to close in the spring or summer of 1995, as Paul Tower stated to several witnesses that he would not agree to sign another car loan with defendant and planned to refuse to give defendant any more money. Within days of the murders, defendant withdrew thousands of dollars from Paul Tower's savings account and attempted to rekindle a relationship with Heather Gallapoo. This evidence shed light on the relationship between defendant and Paul Tower, was relevant and highly probative of defendant's knowledge and opportunity, and was not outweighed by the danger of unfair prejudice.

II

Defendant next argues that the trial court abused its discretion in admitting letters defendant wrote to Heather and Becky because they were improperly seized by jailers and opened by Detective Rau. Defendant argues that the driving factor behind the seizure of these two letters was not institutional security, but rather the jail personnel's effort to assist Detective Rau with his investigation of the murders. He argues that he was prejudiced and that the error was not harmless in that the letters contained inculpatory information, were not cumulative to other evidence and "eventually formed the center of the prosecution's case." Defendant also argues that a third letter he wrote, to Sharon Gallapoo, would not have been discovered had the letter to Heather not been intercepted, opened, and read, and therefore should be suppressed as fruit of the poisonous tree.

A

We review a trial court's ruling at a suppression hearing for clear error. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Resolution of facts about which there is conflicting testimony is a decision for the trial court to make initially and its resolution of factual issues is entitled to deference. *Id.*

Persons incarcerated in jail while awaiting trial are entitled to the protections guaranteed by the Fourth Amendment. *People v Paul Williams*, 118 Mich App 117, 120; 325 NW2d 4 (1982). In analyzing whether the letters at issue were unlawfully seized, the initial inquiry must focus on whether the police conduct violated defendant's reasonable expectation of privacy. *Id.*, citing *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). To determine whether defendant had a reasonable expectation of privacy, two questions are asked: 1) did defendant have a right to assume that his chosen means of communication would insure privacy; and 2) was the government intrusion on defendant's privacy justified under the circumstances. *Williams, supra* at 120.

Michigan cases on this issue are sparse and not directly on-point. In *People v Oliver*, 63 Mich App 509, 515; 234 NW2d 679 (1975), the defendant was arrested in connection with a bank robbery of $38,000 perpetrated with a .38 caliber revolver. While in jail before trial, the defendant attempted to smuggle out a letter he had in a folder he was carrying to the visiting area to meet his attorney. A jailer inspected the folder, confiscated the envelope, returned the folder to the defendant, but gave the envelope to his superiors, who read its contents. Inside the first envelope, which was stamped, was another envelope and a second letter, addressed to the defendant's father, that contained references to

possible escape attempts, and a map marking the spot of marked "bait money." *Id.* at 513. This Court held that there was no Fourth Amendment violation and that the letters were properly admitted at trial, noting that jail personnel had the right to search an inmate both immediately before and immediately after the inmate met with someone who came from, and would return to, the outside world. *Id.* at 515. In a footnote, however, this Court stated: "We specifically do not hold that the right to inspect the defendant's folder for contraband would include the general right to read the materials contained therein. See *Wolff v McDonnell*, 418 US 539, 574-577; 94 S Ct 2963, 2983-2985; 41 L Ed 2d 935, 961-963 (1974)."

In *Williams, supra* at 119, a case decided seven years later, the defendant inmate, who had been arrested in connection with soliciting prostitution, wrote a letter to another inmate, who was an accused prostitute. After the letter was given to a jailer, the jailer copied the letter before delivering it to the female inmate, and the portion of the letter instructing the inmate to testify that she saw someone else driving the defendant's car on the night in question was introduced at trial. Although concluding that the exclusion of the letter would not have altered the trial's outcome, this Court determined that the defendant's Fourth Amendment rights were not violated by the deputy's reading and copying the letter, noting that the defendant had no right to expect that he could deliver messages using jail personnel "without the jail personnel first determining whether the messages contained information adverse to their legitimate interest in preserving internal security, order, and discipline." *Id.* at 121. This Court further noted that "[t]he legitimate interest of the government in 'institutional security' and 'internal order and discipline' makes it not only reasonable but also necessary that jail authorities have the general right to open and read a prisoner's mail." *Id.* at 121, citing *Stroud v United States*, 251 US 15; 40 S Ct 50; 64 L Ed 103 (1919).

In *Stroud, supra*, the Supreme Court held that prison officials' interception of letters written by an inmate that contained incriminating material, and their use in prosecuting the inmate did not violate the inmate's Fourth Amendment rights. The Court noted that the letters came to be in prison officials' possession under established practice, reasonably designed to promote the discipline of the institution. *Id.* at 21-22. More recent cases have limited *Stroud* to situations in which prison officials have seized outgoing mail in the exercise of legitimate government interests. *United States v Whalen* 940 F2d 1027 (CA 7, 1991) (prison officials do not violate the Constitution when they read inmates' outgoing letters, because of their reasonable concern for prison security and inmates' diminished expectations of privacy).

In *Gassler v Wood*, 14 F3d 406, 408 n 5 (CA 8, 1994), the court held that prison officials did not violate the plaintiffs' First Amendment rights by providing photocopies of their outgoing mail to the officer investigating their cases. In observing that the plaintiffs did not assert that prison officials abridged their constitutional rights by monitoring and photocopying their incoming and outgoing mail, but only violated First Amendment rights by providing the investigating officer with copies of outgoing mail, the court further observed:

> Several circuits, including ours, have held that prison officials do not commit constitutional violations by reading prisoners' outgoing nonprivileged mail. See e.g., *Smith v. Delo*, 995 F.2d 827, 830 (8th Cir. 1993) (holding that prison officials are

> justified in screening outgoing nonlegal mail for escape plans, contraband, threats, or evidence of illegal activity); *Stow v. Grimaldi*, 993 F.2d 1002, 1004-05 (1st Cir. 1993) (holding that a New Hampshire State Prison practice of requiring nonprivileged outgoing mail to be submitted for inspection in unsealed envelopes does not violate prisoners' constitutional rights); *United States v. Whalen*, 940 F.2d 1027, 1035 (7th Cir.) (holding that "it is well established that prisons have sound reasons for reading the outgoing mail of their inmates"), *cert. denied*, ___ U.S. ___, 112 S. Ct. 403, 116 L.Ed.2d 352 (1991); *United States v. Kelton*, 791 F.2d 101, 103 (8th Cir.) (prisoner's Fourth Amendment rights were not violated when prison official inspected and copied prisoner's outgoing mail), *cert. denied*, 479 U.S. 989, 107 S.Ct. 583, 93 L.Ed.2d 586 (1986).

In *United States v Wilson*, 447 F2d 1, 7 (CA 9, 1971), the defendant brought Fourth and Fifth Amendment challenges arguing that the admission at trial (without objection) of parts of a letter he wrote while an unconvicted prisoner, contained admissions made involuntarily. The court found no violation, noting that "[p]ursuant to the practice of inspecting outgoing mail of federal prisoners, a United States Marshal examined the letter and made a photo copy" before mailing it, that the guarded language the defendant used strongly indicated that he was aware of that practice, and that his statements were voluntary.

In *United States v King*, 55 3d 1193, 1195-1196 (CA 6, 1995), the court concluded that letters the defendant inmate sent his wife, that she then turned over to the police, were not protected because the defendant could not expect to have the letters returned to him and thus had no reasonable expectation of privacy in the letters that would give rise to a Fourth Amendment right.

In *Whalen, supra*, the defendant inmate, who had slashed another inmate's throat, argued that in order not to have a legitimate expectation of privacy in his outgoing mail, the prison had to notify him that his outgoing mail would be read. The court rejected that argument:

> Mr. Whalen argues that the district court should have granted his motion to suppress the two letters containing admissions that he had cut a man's throat. Mr. Whalen contends that the letters were opened in violation of his first and fourth amendment rights. The district court determined that inmates have no legitimate expectation of privacy with regard to their mail and that prison officials do not violate inmates' rights by examining their letters. Mr. Whalen suggests that a prison must notify a prisoner that his outgoing mail will be read for a prisoner to have no legitimate expectation of privacy worthy of protection under *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The government contends that the line of precedent beginning with *Stroud* [*supra*], precludes acceptance of Mr. Whalen's argument. In *Stroud*, the Supreme Court held that interception by prison officials, and subsequent use in prosecution, of letters written by an inmate did not violate the prisoner's fourth amendment rights. Modern cases have limited *Stroud* to situations in which prison officials have seized outgoing letters in the exercise of legitimate government interests. *See United States v Brown*, 878 F.2d 222, 225 (8th Cir. 1989); *Meadows v Hopkins*, 713 F.2d 206,

208-11 (6th Cir. 1983). Thus, *Stroud* "still controls cases in which such seizures are prompted by reasonable justification." *Brown,* 878 F.2d at 225.

> "Because of their reasonable concern for prison security and inmates' diminished expectations of privacy, prison officials do not violate the constitution when they read inmates' outgoing letters." *Id.; see also United States v. Kelton,* 791 F.2d 101, 102-03 (8th Cir.), *cert. denied,* 479 U.S. 989, 107 S.Ct. 583, 93 L.Ed.2d 586 (1986). FCI-Oxford officials are permitted to examine inmates' outgoing mail to ensure that the mail does not interfere with the orderly running of the prison, contains no threats, and does not facilitate criminal activity. *See* 28 C.F.R. § 540.14(b). In short, it is well established that prisons have sound reasons for reading the outgoing mail of their inmates.
>
> The record affirmatively shows that the prison requires inmates to leave their letters unsealed and that Mr. Whalen had left unsealed the two letters at issue in this case. It is therefore clear that he had no expectation of privacy with respect to their contents. Because Mr. Whalen demonstrated an expectation that his mail was being inspected, we have no difficulty agreeing with the district court's refusal to suppress Mr. Whalen's letters. [940 F.2d at 1034-1035.]

Regarding mail to or from family or loved ones, 60 Am Jur 2d, Penal and Correctional Institutions,§ 58, p 1166 states in pertinent part:

> While an inmate should be allowed a reasonable and proper correspondence with members of his immediate family and, at times, with others, the correspondence is subject to censorship to be certain of its reasonableness and propriety, and a broader correspondence is subject to substantial limitations or to absolute prohibitions.

B

Regarding defendant's letter to Becky.[1] which was mailed while she was in jail, both Becky and Detective Rau testified at trial that she notified Detective Rau of a letter defendant sent her before sending her the letter at issue, and at that time she gave Detective Rau permission to have any letters defendant sent her. The administrator of the county jail testified at trial that it is jail policy to open incoming inmate mail to check for contraband. The record establishes that jail personnel opened the letter, and that they could properly do so pursuant to that policy. Under the circumstance that Becky gave Detective Rau permission to have letters from defendant, we conclude that the letter was not improperly seized.

Regarding defendant's letter to Heather,[2] it was postmarked November 2, 1995 and sent to her at the jail. Heather had been released from jail on November 1, 1995. The corrections officer that opened the letter testified at trial that he did so in the course of opening other inmate mail and did not know at that time that Heather was no longer an inmate. He testified that he normally checks incoming mail for contraband but does not read the contents. The corrections officer testified that the jail

administrator had written a note to staff indicating that defendant's outgoing and incoming mail should be monitored and given to Detective Rau, and that defendant was on suicide watch at the time. He testified that, contrary to his normal procedure, he read defendant's letter to Heather because 1) it was from defendant, and pursuant to jail policy the outgoing mail of inmates on suicide watch can be opened,[3] and 2) because it was addressed to another inmate and could discuss criminal activity or suicide.

The record is clear that Heather gave Detective Rau permission to read and keep the letter after he had already read it. Heather conceded that she recalled telling Detective Rau, when he called and told her that defendant had sent her a letter, that he did not have to bring the letter to her at home and that she did not want anything to do with it. The prosecution argues that Detective Rau gained access to defendant's letter to Heather by legal means because the letter was opened pursuant to jail policy to inspect incoming mail for contraband, and because Heather gave Detective Rau permission to read and keep it.

Defendant asserts, however, that defendant's letter was not examined before it left the jail as outgoing mail, and that the return address was to a location other than the jail. Defendant argues that he had a reasonable expectation of privacy because he had a right to expect that, since Heather was no longer an inmate, his letter would be returned to the return address indicated, and because he reasonably expected that Heather's mail would not be scrutinized like regular inmate mail because she had been held as a material witness, and not a regular inmate. Defendant cites no authority to support either proposition. We have found no Michigan law on point.

Annotation: Censorship and Evidentiary Use of Unconvicted Prisoners' Mail, 52 ALR3d 572, notes:

> Courts discussing the propriety of the censorship and evidentiary use of an unconvicted prisoner's mail ordinarily have framed the question in terms of whether mail between the prisoner and certain correspondents . . . was proper . . . and usually have not considered whether distinctions might be made on the basis of whether the mail was incoming or outgoing in nature.

We agree with the trial court that the jail's policy regarding incoming mail did not differentiate between inmates and pretrial detainees, and that when jail security is at issue, the distinction between inmates and pretrial detainees is blurred. We observe that the few cases we have found involving correspondence between inmate defendants and material witnesses do not support defendant's position. In *State v Loza*, 71 Ohio St 3d 61; 641 NE2d 1082 (1994), the defendant challenged on Fourth and First Amendment grounds jail personnel's seizure and copying of letters he wrote from jail. The court concluded there was no Fourth Amendment violation in the admission into evidence of the letters, noting that they were to a key witness in the state's case against him, and that the state had an important interest in ensuring that the defendant was not threatening or intimidating the witness. In *Hicks v State*, 480 SW2d 357 (Tenn App, 1972), the defendant inmate wrote a letter to his girlfriend, a potential witness and an inmate at the same jail. The letter was intercepted before it was delivered. The court held proper the admission into evidence of the letter, the contents of which could have been interpreted

as a confession of guilt, noting that it was not seized without process and was voluntarily written. *Id*. at 359-360.

Under the circumstance that the jail had a written policy allowing incoming mail to be opened and inspected for contraband, and a policy allowing outgoing mail to be opened if the inmate is a suicidal risk, and given that Becky and Heather were material witnesses and inmates, defendant did not have a right to assume his chosen means of communication would ensure privacy and that the government's intrusion into his privacy was justified. See *United States v King*, 55 F3d 1193, 1195-1196 (CA 6, 1995). Defendant thus did not have a reasonable expectation of privacy in the content of the letters once they reached their recipients, after which the recipients turned them over voluntarily to Detective Rau. We find no error.

Because there was no constitutional violation regarding defendant's letter to Heather, the subsequently discovered letter to Sharon Gallapoo, which she voluntarily gave to Detective Rau, does not constitute the fruit of an illegal search.

III

Defendant next argues that the trial court violated his constitutional rights and committed error requiring reversal when it treated the contents of the three letters discussed in issue II, *supra*, as adoptive admissions of the preliminary examination testimony of three prosecution witnesses, Heather, Becky, and April, and permitted the jury to read their preliminary examination testimony during trial and during their deliberations.

We review a trial court's determination to admit evidence for abuse of discretion. *Bahoda, supra* at 289. Adoptive admissions[4] are admissible when it clearly appears that the defendant understood and unambiguously assented to the statements made. *People v Lowe*, 71 Mich App 340, 346; 248 NW2d 263 (1976). The question of fact whether the party's conduct manifested his assent to the statement of the other person is a preliminary question for the court. *Id.*

Following defendant's preliminary examination on November 1, 1995, and while defendant was in jail awaiting trial, defendant wrote the letters discussed *supra* to Heather, Sharon Gallapoo, and Becky, referring to the preliminary examination. Defendant's letter to Becky, postmarked November 2, 1995, included the statements "everything you said was true, but this knife thing" and "Heather and April told the truth." Defendant's letter to Heather, also postmarked November 2, 1995, included the statements: "Everything [Becky] said was pretty true except I don't know were [sic] she got this knife idea!" Defendant's letter to Sherry Gallapoo included "I just was hoping they [Heather and April] would tell the truth and they did!" and "I will try to keep Heather and April out of this, I can stipulate their [sic] testomonies [sic] from the prosecutor say [sic] they don't have to come to court anymore."

At trial, the prosecution, over defendant's objection, sought admission of portions of the preliminary examination covering the testimony of Heather, Becky, and April under MRE 801(d)(2)(B). The trial court admitted the portions of the preliminary examination in which the three testified and allowed the jury to take copies of the transcript portions into the jury room.

Defendant argues that the trial court erred in treating defendant's statements in the letters as adoptive admissions and that the error was compounded when the jury was allowed to take the transcript into the jury room because of the risk that defendant's conviction wrongfully rested on preliminary examination testimony. Defendant argues that as a result, the jury did not have to rely on their memory when evaluating the witnesses because they had access to the transcript. Defendant further argues that Heather, April, and Becky all had credibility problems due to their past criminal activities and that the adoptive admission ruling eliminated the credibility problem as to many issues because the decision to treat every statement that these critical witnesses made at the preliminary examination as true effectively prevented the credibility questions from going to the jury. Defendant argues that in the normal case the defense has the right to cross-examine both at the preliminary examination and at trial, but in this case the adoptive admission ruling curtailed the cross-examination at trial because it eliminated credibility issues. Finally, defendant argues that if the letters and record are considered, defendant did not intend his statements to be admissions. He argues that the letters make clear that his purpose in writing them was to ingratiate himself with the women.

We first note that contrary to defendant's apparent argument, the jury did not see the entire preliminary examination transcript, nor was the jury instructed that the admissions applied to the entire transcript. We further note that the record does not support defendant's argument that admission of the preliminary examination testimony effectively curtailed the defense's cross-examination of these witnesses. Rather, the record indicates that the witnesses were vigorously cross-examined, and at length, and that their credibility was repeatedly called into question. Further, defendant does not argue, nor does the record support, that the preliminary examination testimony of these witnesses was different in material respects from their trial testimony.

Defendant's express statements in the letters manifesting belief in the truth of the witnesses' preliminary examination testimony qualified as adoptive admissions under MRE 801(d)(2)(B). See *Lowe, supra* at 346. The cases defendant cites in support of his argument that there was error involve use of a defendant's silence as an adoptive admission, and are thus inapposite here. As it clearly appeared in defendant's letters that he understood and unambiguously assented to the witnesses' preliminary examination testimony, the trial court did not abuse its discretion by admitting the challenged evidence. *Lowe, supra* at 346; *People v Davis,* 216 Mich App 47, 56; 549 NW2d 1 (1996); see also *People v Page,* 41 Mich App 99, 102-104; 199 NW2d 669 (1972). We conclude that the trial court did not abuse its discretion.

IV

Defendant next argues that the trial court abused its discretion in permitting a prosecution witness, Lieutenant David Minzey, to testify in rebuttal over defendant's objection. Defendant argues that the testimony was not proper rebuttal evidence because it was offered to address a defense theory that did not have specific evidentiary support and also argues that it could have been offered in the prosecution's case in chief. We disagree.

We review a trial court's decision to admit rebuttal testimony for abuse of discretion. *People v Figgures,* 451 Mich 390, 398; 547 NW2d 673 (1996). Rebuttal evidence contradicts, repels,

explains or disproves evidence produced by the other party and tends directly to weaken or impeach the same. *Id.* at 399. The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecution's case in chief, but whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *Id.*

Defense counsel in opening statement stated that Heather could not have been defendant's motive for the murders because defendant did not see her from about April 1995 to after the murders in July 1995; that defendant could not have been at the Tower farmhouse on either the evening of July 5 or 6, when neighbors heard gunshots, or the following weekend; that defendant had a warm and loving relationship with Ron and Paul Tower and no history of violence; and that this background could not be reconciled with their execution-type murders. Defense counsel further stated:

> You may hear some testimony that crack, prostitution, street life of that type, involves desperation, desperation including financial desperation, doing whatever has to be done to get money. You may hear some testimony about how that addictive, desperate lifestyle can include violent activity. I believe you'll hear testimony that in the course of Kevin's efforts to – and whether it is a romantically-based effort to rescue Heather, whether it is based upon romantics and wanting to be with Heather for the rest of his life, or whether it's based on any other motive – but that either way, that **in the course of that, there were occasions where at least two of the street persons from Grand Rapids – by "street persons," that's a generic reference. The intent is [sic] to persons involved in crack activity – did go with Kevin, back in February or so of '95, up to the Tower farm; that the Tower farm location, the Paul and Ron Tower residence, was a place where at least two of the crack persons had been with Kevin Tower back in this January, February, early March time frame.** You may hear some further testimony in that regard. [Emphasis added.]

At trial, defense counsel elicited from Becky during cross-examination that being a crack addict created desperation, led her to become involved in prostitution, resulted in high expenses to maintain the crack habit, and in her being arrested periodically, resulted in her stealing and being involved in burglaries, and that she carried a gun. Defense counsel further elicited that as part of that street lifestyle she would sometimes lie to the police, that she had committed a breaking and entering and stolen $1,100 from a club in Grand Rapids, and that guns had been taken in that incident, either of .25 or .22 caliber, the latter having been used to murder the Tower brothers in the instant case. Defense counsel also asked Becky if she had told cellmates that she killed Ron and Paul Tower. Defense counsel also questioned Becky regarding whether her boyfriend, Dave, whom she had testified she would buy crack from with her prostitution profits, had ever driven or ridden in Paul Tower's Escort and whether she had ever told anyone that Dave had asked her to wipe his prints off the Escort. Defense counsel elicited from Becky that as a result of her involvement in the four bank withdrawals, she was under two felony criminal charges, for uttering and publishing and aiding and abetting. Defense counsel also asked Becky whether Billy Sutton, a man she testified she got crack from, had been to the Tower farmhouse.

Defense counsel also questioned April regarding prostitutes' access to crack and elicited that most of the crack dealers are pimps. Defense counsel elicited from her that violence and the use of guns

in prostitutes' relationships with their pimps is common, that desperation for money to buy drugs is an issue, and questioned her regarding whether stealing was unusual. Defense counsel also questioned Heather regarding her being at the Tower farmhouse with Billy Sutton, who supplied her with crack and to whom defendant at one point owed money.

The prosecution offered the testimony of Lieutenant David Minzey as an expert in violent crime scene analysis to rebut the defense's theory that street persons committed the murders of the Tower brothers. Minzey testified regarding a profile of the perpetrator in the instant case, opining that the murderer most likely had emotional ties to the victims and that the crime scene and site at which the bodies were left were not indicative of a street person having committed the crime.

We agree with the trial court that the prosecution learned of the defense's street person theory during opening statement, that "flesh was put on the bones" of that theory during trial, and that the prosecution moved reasonably promptly in obtaining the necessary rebuttal evidence. Defense counsel's questioning of the witnesses discussed above was an attempt to gather testimony in support of the theory that street persons in search of drug money committed the murders. Thus, the rebuttal testimony was properly responsive to a theory developed by the defendant. *Figgures, supra* at 399. We further conclude that the prosecution did not impermissibly "split" its case or "sandbag" defendant.

Defendant also argues that Lieutenant Minzey's profile testimony was extremely prejudicial because it so closely fit the profile of defendant, and that the prosecutor improperly argued in closing argument that the testimony was substantive evidence of guilt. We note that while defendant objected to the rebuttal witness on timeliness and notice grounds, and argued that he was not an "expert," he did not object to the testimony on the grounds now asserted. We further observe that counsel dealt with the testimony quite effectively on cross-examination, and that assuming that there was error, the error was harmless in light of the overwhelming evidence linking defendant to the murders and other crimes charged. *People v Mateo,* 453 Mich 203, 212; 551 NW2d 891 (1996). We further note that the record does not support defendant's argument that the prosecution argued in closing argument that Minzey's testimony was substantive evidence of guilt.

V

Defendant next argues that the trial court improperly denied his motion to suppress the .22 caliber rifle seized pursuant to a warrant from the home where he resided with his parents on July 30, 1995.

Probable cause sufficient to support the issuance of a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched. *People v Brannon,* 194 Mich App 121, 132; 486 NW2d 83 (1992). Appellate scrutiny of a magistrate's finding of probable cause requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *People v Russo,* 439 Mich 584, 603; 487 NW2d 698 (1992).

On July 15, 1995, the police applied for and received a warrant to search the residence located at 7697 Almy Road in Montcalm County. The warrant listed "weaponry," among other items. The warrant was executed on that date and a number of items were seized, including shoes and clothing. A .22 caliber rifle seen during this search was not seized. The affidavit supporting the warrant stated in pertinent part:

> B. On July 12, 1995, Affiant was assigned to conduct a follow up investigation into a missing persons complaint taken by Deputy Scott Ruggles. Deputy Ruggles reported that on Monday, July 10, 1995, he met with complainants, Ila and Gordon Sieffert. The complainants reported that their brothers, Ronald Tower, dob 7/10/37 and Paul Tower, dob 10/24/53, had been missing since July 6, 1995. Complainants also advised that a 1992 Ford Escort, red in color, and registered to Paul Tower, was also missing. LEIN records confirm the vehicle is registered to Paul Tower, bearing Michigan registration plate EEG049.
>
> C. On July 13, 1995, Affiant met with Ila Sieffert. Ms. Sieffert advised as follows:
>
> 1. That her brothers, Ronald and Paul Tower, reside together at 9344 25th Avenue, Remus, MI.
>
> 2. That her brothers have been missing since Thursday, July 6, 1995. She advised that her brothers are mentally slow and that it is unlike them to leave home overnight without notifying her.
>
> 3. That Gordon visited the brothers' home on Thursday, July 6, 1995 and observed that while the two vehicles owned by Paul were present, neither brother could be found. Gordon did not find a note indicating their whereabouts.
>
> 4. That Ila visited her brothers' house on Friday, July 7, 1995. She observed that neither brother was present and their Ford Escort was also missing. She also located a note in the residence which read, "Went to Detroit, be back Satureday".
>
> 5. Ila also advised that she received a telephone call from Paul's place of employment, Leprino cheese, and the caller expressed concern that Paul had not shown up for work.
>
> 6. Ila also advised Affiant she encouraged Paul Tower to keep his financial records in a lockbox located within a gun cabinet located in the residence.
>
> D. That on July 12, 1995, Affiant spoke with GRPD Sgt. Warwick. He advised that GRPD policed a hit and run accident involving a 1992 Ford Escort, bearing Michigan plate EEG 049. Sgt. Warwick advised that the driver of the Escort fled the scene and GRPD impounded the vehicle.
>
> According to LEIN records, this vehicle is registered to Paul Tower. Affiant then obtained a copy of the traffic accident report. Said report identifies a two-car accident.

The driver of second car is identified as David Cohoon. The accident occurred on July 9, 1995.

E. On July 12, 1995, GRPD officers conducted a search of the Ford Escort. Affiant was advised by Dt. Rick Litts that a search of the trunk area revealed the presence of blood and a bloody t-shirt. Dt. Litts advised that officers located several pieces of identification belonging to Paul Tower, including Paul Tower's driver's license. Dt. Litts also advised Affiant that he observed cut marks on the blood stained t-shirt. He advised that, in his opinion, the cut marks were made with a knife or some type of cutting instrument.

F. Affiant also spoke with GRPD Sgt. Richard Knol. Knol advised that Officers also located several pieces of paper upon which it appeared that someone practiced writing the name Paul Tower several times. Knol also advised that forensic testing of the blood samples located in the vehicle were of human origin. Knol also advised Affiant that a small quantity of dirt was found within the trunk.

G. That on July 13, 1995, Affiant spoke with Kevin Tower. Tower advised that he last saw Paul and Ronald on Wednesday, July 5, 1995. Kevin Tower advised that he has no knowledge as to their whereabouts and he has no knowledge regarding the missing Ford Escort.

Affiant requested Kevin Tower to provide a handwriting sample: Affiant requested Kevin to write "Went to Detroit, be back Saturday". Kevin Tower provided Affiant with the sample. Kevin Tower spelled the word "Saturday" as follows: "Satureday".

Kevin Tower also agreed to allow Affiant to photograph him. Affiant obtained a photograph with an instamatic camera.

H. That on July 13, 1995, Affiant spoke with David Cohoon, the driver of the other vehicle involved in the accident. Cohoon provided Affiant with a physical description of the other driver; this description matched the description of Kevin Tower.

I. That on July 13, 1995, Affiant met with David Cohoon. Affiant showed him a six (6) person photographic lineup and asked him whether he could identify the driver of the Ford Escort. Cohoon identified Kevin Tower's photograph as the driver of said vehicle.

J. That on July 13, 1995, MCSD officers and MSP crime lab conducted a search of the Paul Ronald Towers [sic] residence, including land and outbuildings. D Cpt. Lenon advised Affiant that officers located evidence of blood and hair tissue in a wheel barrow located in the garage. D/Cpt. Lenot advised that officers also located at least two (2) sets of shoe prints and two sets of tire tracks in the garage. One set of shoe prints displayed a "Nike" logo while the other displayed a patterned bottom. Both sets of

shoeprints appeared to be consistent in size with the male gender. D/Cpt. Lenon advised that Lt. Richard Kaledas stated to him that upon arrival at the scene, the garage was secured with two "Master Lock" brand padlocks, one of which was cut by Lt. Kaledas to gain entry. D/Cpt. Lenon advised that MSP Lab Scientist Kevin Streeter tested blood samples recovered from the scene and they were identified as being of human origin.

D/Cpt. Lenon further advised that he and other officers located a wooden bench and a blue-colored barrel within a second outbuilding located on the premises. D/Cpt. Lenon observed what appeared to be blood on these items.

K. Affiant spoke with Barb Obert, Operations Assistant for Old Kent Bank. Obert advised that $4,400 was withdrawn from the savings account of Paul Tower between the dates of July 7, 1995 and July 8, 1995. Affiant has obtained copies of the withdrawal slips used in connection with these transactions. These withdrawal slips indicate that the person who withdrew the money presented the driver's license number of Paul Tower. Affiant also spoke with Sue Begeman. Begeman advised that she transacted two of the withdrawals. She recalled that on one withdrawal she noticed a female who appeared to have manly features.

L. On July 14, 1995, Affiant spoke with Heather Gallapoo. Ms. Gallapoo advised that on July 7, 1995, she was working as a prostitute in downtown Grand Rapids. She advised that on this date, Kevin Tower picked her up on the street in a small red car. Ms. Gallapoo advised that she knows Kevin Tower from several prior occasions and this was the first time she has seen him drive this car. Gallapoo advised that Tower normally drives his pickup truck.

Gallapoo also advised that on Sunday, July 9, 1995, she was with Kevin Tower and he had his pickup truck. Within the back of the truck, she observed two shovels.

Gallapoo also advised Affiant that Kevin Tower told her that he and a "Becky" went through a drive-through bank and withdrew money. Kevin informed her that he was disguised during the transaction.

M. On July 15, 1995, Affiant obtained photographs from the MSP Crime Laboratory. These photographs depict the tire tracks which were located within the garage on the Ronald and Paul Tower residence.

On July 15, 1995, Affiant arrested Kevin Tower for Unlawful Driving Away of an Automobile and Forgery. In connection with this arrest, Affiant impounded Kevin Tower's vehicle, 1987 Chevy pickup, bearing Michigan plate EK 0282. Affiant has personal knowledge that this vehicle is regularly used by Kevin Tower. Affiant has observed him driving this vehicle. Affiant observed that the tire treads on one of the

tires of this vehicle are similar to the tire treads depicted in the photographs. Affiant observed that there were no shovels within the truck of this vehicle [sic].

On July 26, 1995, bodies matching the descriptions of Ron and Paul Tower were discovered. On July 30, 1995 the police applied for and received a second warrant to search the same residence. A .22 caliber rifle was seized during the search. The affidavit supporting the second warrant was substantially the same as the first affidavit, containing the substance of the above quoted paragraphs but from a different affiant, and adding the following three paragraphs:

> N. That on July 26, 1995, Affiant responded to a police dispatch call which advised that two bodies were discovered in an area located within Deerfield Township. Affiant went to the described area . . . [and] observed two (2) deceased males located in the ditch area of the road. Affiant has personal knowledge as to the physical characteristics of Ronald and Paul Tower and in viewing said bodies, Affiant believes that they are Ronald and Paul Tower. Affiant secured the deceased and the bodies were transported to Blodgett Hospital for purposes of an autopsy.
>
> O. That on July 30, 1995, Affiant was advised by D/Sgt. Rau that he was present at the autopsies performed on the bodies believed to be Ronald and Paul Tower. D/Sgt. Rau advised Affiant as follows:
>
> 1. The autopsies were performed by forensic pathologist Dr. Stephen Cohle;
>
> 2. Dr. Cohle located fragmented lead in the skull of the body believed to be Paul Tower;
>
> 3. Dr. Cohle reported locating two (2) holes in the skull of the body believed to be Ronald Tower. Dr. Cohle recovered two (2) 22 caliber bullets from the neck area of the body.
>
> 4. Dr. Cohle reported that bullet wounds on each body, would likely be fatal.
>
> P. That on July 24, 1995, Affiant and D. Sgt. Rau conducted a search of the Lyall Tower residence, also being the residence of Kevin Tower. Said search was pursuant to a search warrant issued by the 77th District Court.
>
> Affiant secured items from this location, being items identified on the previous search warrant. Said items include, but are not limited to, "NIKE" brand tennis shoes which bear a tread pattern similar to that which was found in the garage belonging to Paul and Ronald Tower. Officers did not seize firearms for the reason that, at that time, officers were not aware that Ronald and Paul Tower were killed with a firearm. Now having such knowledge, Affiant has reasonable and probable cause to believe that a search of the "1" above will lead to the discovery of criminal evidence, to-wit: as described in "2".

The July 30, 1995 warrant listed "any and all rifles or pistols including but not limited to firearms which are capable of firing .22 caliber ammunition."

Defendant argues that the rifle seized pursuant to the second warrant should have been suppressed because the second warrant was defective in that it contained no facts which indicated how the affiant knew that defendant resided at the place to be searched and was thus unreliable. Defendant also argues that the July 30 affidavit did not allege any facts which would establish a nexus between defendant and the .22 caliber rifle observed during the search on July 15; that there was nothing in the affidavit indicating that defendant owned or ever used or had access to the weapon. Thus, defendant argues the police were operating on naked suspicion rather than probable cause. Defendant further argues that the police's knowledge about the rifle was based on a tainted search, that the weapon could have been seized at the initial search, that the discovery of the bodies was insufficient to cure the taint caused by the first search, and that had the rifle been seized at the initial search, it would have been suppressed.

The trial court granted defendant's suppression motion with respect to the first warrant because the affidavit did not establish a nexus between defendant and the place to be searched. The trial court denied defendant's suppression motion with respect to the second warrant, noting:

> I have reviewed the [July 30, 1995] affidavit. It appears to be substantially the same as the prior affidavit, with some additional information contained in it. I had already said that the prior affidavit, the July 15th affidavit, did contain information indicating there's probable cause to believe that there exists incriminating evidence involving this defendant.
>
> Looking at paragraph P, I believe it is the only portion of the July 30th affidavit that is tainted by the search resulting from the July 15th affidavit. Paragraph P, as the prosecutor has argued, I believe can be revised, for lack of a better term, by striking any information relative to the taint, leaving only information indicating that the area to be sought [sic] is the Lyall Tower residence, also being the residence of Kevin Tower.
>
> I don't think that in striking, we need grammatical perfection. But I believe that that addition provides what was missing in the July 15th affidavit sufficient to, one, remove the taint from the July 30th affidavit; and, secondly, to provide the previously missing nexus between the allegations giving rise to a reasonable belief that there exists incriminating evidence at the place sought to be searched. . . . . I believe it reasonable for a magistrate to conclude that evidence, such as is sought, may well be at the residence of the defendant.

We agree with the trial court's determination that a magistrate could reasonably conclude after a common sense and realistic reading of the affidavit that probable cause existed for the search. *Russo, supra* at 604. The affidavit supported that there was likely incriminating evidence linked to the defendant and that defendant resided in the house to be searched. A magistrate could reasonably conclude that the type of weapon sought would likely be kept at the residence. At the time of the initial

search, the bodies had not been discovered and the evidence then available indicated that the victims had been killed with a sharp object. The subsequent discovery of bodies that had been shot with a .22 caliber weapon justified the police in seeking a second warrant. Although the affidavit supporting the July 30, 1995 warrant mentioned the earlier search, the trial court struck the reference to the original search and considered the affidavit without reference to it. Where a portion of an affidavit in support of a search warrant is valid and a portion is constitutionally invalid a court may sever the valid portions of the warrant and admit any evidence seized under those portions. *People v Melotik*, 221 Mich App 190, 200-201; 561 NW2d 453 (1997).

> When a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, if the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant apart from the tainted information, the evidence seized pursuant to the warrant is admitted. [*Melotik, supra* at 201, quoting *United States v Shamaeizadeh*, 80 F3d 1131, 1136 (CA 6, 1996).]

We conclude that the trial court did not err in denying defendant's motion to suppress the .22 caliber rifle.

VI

Defendant argues that admission of evidence from a pre-trial interview at which he had not received *Miranda*[5] warnings denied him a fair trial.

Miranda warnings are required only when a person is subjected to custodial interrogation. *People v McElhaney*, 215 Mich App 269, 278; 545 NW2d 18 (1996). The relevant inquiry is whether the person was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way. *People v Honeyman*, 215 Mich App 687, 694; 546 NW2d 719 (1996). The test for custody is whether the accused reasonably could have believed that he was not free to leave. *McElhaney, supra* at 278.

The trial court denied defendant's motion to suppress on the basis that defendant was not subjected to a custodial interrogation. We agree with the trial court's determination.

Detective Rau began to investigate the disappearance of the Tower brothers on July 12, 1995. On the next day, officers discovered blood and other evidence suggesting foul play in buildings on the Towers' farmhouse property. The crime lab was called in and the farm was considered a crime scene. A number of officers were present and investigating, as well as a number of civilian volunteers. A number of Tower family members were present at the farm that day as well. Detective Rau had been told by the Tower family that defendant had seen the Tower brothers on July 5, 1995 and that he was probably one of the last persons to have seen them, and Rau indicated that he would like to speak with defendant. On July 13, 1995, Rau told defendant's father that he had learned that defendant was probably the last person to see the Tower brothers and he needed to talk to him. Defendant's father told Detective Rau that defendant was already on his way to the farm. Rau spoke to a number of family members that day. When defendant arrived, he voluntarily agreed to talk to Detective Rau in his

unmarked car. It was a very hot day and Detective Rau had the air conditioning on. The car was unlocked and the engine was running. Defendant sat in the driver's seat and Detective Rau was in the passenger seat and ate lunch as they talked. Defendant was not told he could not leave and the interview was non-confrontational. When the interview finished, defendant agreed to a handwriting exemplar and to have his photograph taken.

The record does not support defendant's argument that he would not have been free to leave had he chosen to terminate the interview. We agree with the trial court's determination that defendant was not subjected to a custodial interrogation or deprived of freedom of action in any significant manner. We find no error.

VII

Defendant last argues that admission of evidence from the search of his vehicle denied him a fair trial. Defendant argues that the police lacked authority to seize and impound his vehicle when he was arrested and that the evidence subsequently obtained from the truck should have been suppressed. The trial court denied defendant's motion to suppress.

The police activity involved in towing defendant's vehicle constituted a seizure subject to Fourth Amendment analysis. *People v O'Brien*, 89 Mich App 704, 714; 282 NW2d 190 (1979).

Detective Rau testified that defendant was arrested around 10:30 p.m. on July 14, 1995, for uttering and publishing and auto theft. Defendant was arrested in the parking lot of his workplace, the Butterworth Medical Center in Grandville, and defendant's truck, with which Detective Rau was familiar as defendant's vehicle, was in the parking lot. The vehicle was towed to the Sheriff's Department in Mecosta County. The truck was searched only after a search warrant was obtained. Detective Rau testified that he believed that the vehicle was part of the crime scene, as he had observed a tire in the back of the pickup that had an unusual tread pattern that was similar to tire tracks found in the Tower farmhouse garage, where human blood had also been found.

We agree with the trial court that the presence of the tire in the truck gave the officers reasonable cause to believe that the vehicle was involved in a crime, and that the seizure was thus proper under MCL 257.252d(1); MSA 9.1952, which provides in pertinent part:

> A police agency or a governmental agency designated by the police agency may provide for the immediate removal of a vehicle from public or private property to a place of safekeeping at the expense of the registered owner of the vehicle in any of the following circumstances:
>
> * * *
>
> (e) If the vehicle must be seized to preserve evidence of a crime, or when there is reasonable cause to believe that the vehicle was used in the commission of the crime.

The police had probable cause to believe that evidence of the crime could be found in the vehicle, and the mobility of the vehicle made it unnecessary to obtain a warrant before the seizure. See *O'Brien, supra* at 714-715. We find no error.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Helene N. White
/s/ Michael R. Smolenski

[1] The letter stated:

Becky,

How's ya doin [sic]? I can't write a lot, I can tell you we will hopefully get out soon! I'm not holding anything against you! I just don't know were [sic] you got this knife idea! Are you sure you didn't see something that just look [sic] like a knife? I didn't ever have any knife in my truck! I'm trying as hard as I can to get us out but I can't get us out I [sic if] you say things like that! I'm spending several thousand dollars already to get out! And when I leave they should have to let you go to [sic]! Everything you said was true, but this knife thing, Heather and April told the truth, I wouldn't let my attorney try to tear you apart, he kept asking me and told [sic] him no! no! no! I just want everybody to tell the truth and not try to make it sound like they are lying. Good luck Girl! Hope to see you someday!

[2] Defendant's letter to Heather stated:

Hi, [illegible] It seems I try to [sic] hard to help people. You know and I know we [illegible] pretty much friends all the time. I didn't murder anybody, it was an accident and I got scared and ran, but I didn't have any money, that's why I got becky [sic] to help me get the money, I just wanted to get some money and leave, and never come back [.] I didn't care were [sic] I ended up at. But becky [sic] kept taking most of the money and she kept wanting to go back to those dam [sic] banks, she even wanted to go to a bank in Grand Rapids.

I'm not upset with her though, I'm the one that took her with me! I still have to look at her as a friend. She said she seen [sic] a knife, she's gotta be crazy, she know [sic] I never had no [sic] knife. Maybe she just think [sic] she seen [sic] something like a knife. Everything she said was pretty true except I don't know were [sic] she got this knife Idea [sic]!

> I miss you a lot, we were good friends, we talked about alot the last time I saw you. I know you are going threw [sic] withdrawls [sic], but you knew you had to do this someday. I hope you do well, You look a hell of alot better now. Last time I seen [sic] you, you looked bad, I didn't even want to touch you.
>
> Things look bad for me and probably becky to [sic], but I'm trying to get us out of here. I wish I could just go talk to the Prosecutor and just say what happened but my attorney won't let me even though my assistant attorney and me [sic] want to !
>
> I miss you and April a lot, I'm just sorry you got dragged into this. Well see ya Love ya friends Kevin
>
> P.S Write me BACK! Here [sic?] 225 S. Stewart.

[3] The prosecution introduced at trial a document distributed by the Mecosta County Sheriff Department to Corrections, dated May 26, 1995, that stated in pertinent part:

> OBJECTIVE: to insure the constitutional rights of the inmate are maintained and clarify what is allowed by law relative to inmate correspondence.
>
> Reference: R791.655, Rules & Regulations, Michigan Department of Corrections.
>
> 1. All incoming mail will be opened and inspected for contraband in the presence of the inmate. Outgoing mail will be inspected for contraband without opening.
>
> * * *
>
> 4. Outgoing mail shall be sent unopened, unless there are reasonable grounds to believe that one or more of the following exist:
>
> A. Correspondence contravenes law or postal regulations.
>
> B. **The inmate is a suicidal risk.**
>
> C There is plotting against the good order and security of the facility.
>
> D. **The correspondence concerns plans or schemes for criminal activity**, or a prior substantiated instance wherein, one (1) or more of the conditions enumerated above was present. [Emphasis added.]

Also admitted at trial was a memorandum from the Mecosta County Sheriff Department to all Corrections staff, dated August 31, 1995, stated in pertinent part:

> **HIGH RISK INMATES**:

> This morning, during a cell search, a piece of sharpened metal was found in inmate Dolby's Bible. This is the same Dolby who managed to collect several doses of medication and in whose cell various cleaning supplies have been hoarded. I can's stress enough that constant observation and vigilance on our part is the only way we will keep this type of thing from occurring.
>
> Effective immediately inmate Dolby will be relocated to a maximum security cell . . . .
>
> **Inmate Kevin Tower will also remain on 30 minute cell checks**. [Emphasis added.]

[4] The instant case does not involve the use of defendant's silence as an adoptive admission, a subject discussed in *People v Sholl*, 453 Mich 730, 734-738; 556 NW2d 851 (1996).

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).